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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 791.

JOSEPH ARRINGTON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. _____.

JOSEPH ARRINGTON,

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vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Joseph Arrington, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio, made and entered by said Court on the 7th day of July 1965 (a copy of which is printed in Appendix A, *infra* page 17) which affirmed the Ohio Court of Appeals and ultimately the conviction and life sentence given the Petitioner by the trial court.

OPINIONS OF THE COURTS BELOW.

The Trial Court, that is, the Cuyahoga Common Pleas Court did not render any formal opinion. The Journal Entry of that Court is printed in Appendix B, *infra* page 17.

The Journal Entry of the Court of Appeals, which likewise did not render any formal opinion, is printed in Appendix C, *infra* page 18.

The original order of the Supreme Court is printed in Appendix D, *infra* page 19, and the formal opinion, by that Court, rendered in support thereof is officially reported as *State v. Arrington*, 2 Ohio St. 2d 172 (March 19, 1965). This opinion is printed herein in Appendix E, *infra* page 19.

The opinion of the Supreme Court of Ohio, on Petitioner's Motion for Reconsideration, is officially reported as *State vs. Arrington*, 3 Ohio St. 2d 61 (July 7, 1965), and is printed herein as Appendix F, *infra* page 20.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgment of the Supreme Court of Ohio became final on the 7th of July, 1965. And this Court, by an appropriate entry (See Appendix G, *infra* page 24), extended the time within which this Petitioner could file a Petition for Certiorari until December 4, 1965.

The jurisdiction of this Court is invoked under Title 28 U. S. C. Section 1257 (3), since the certain rights, privileges and immunities guaranteed the Petitioner by the federal constitution are claimed to have been violated.

STATE OF THE PROCEEDINGS AT WHICH, AND MANNER IN WHICH, THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED.

I.

During the trial of Petitioner certain members of the Cleveland Police Department were allowed to testify, over objection, as to the details of their interrogation of Petitioner (after indictment) and were permitted to give evidence as to an "alleged" confession and other damaging admissions. An appropriate motion was made by trial counsel to strike:

* * * All of the testimony by Lieutenant White, in reference to an alleged confession by Arrington be stricken from the record; and * * * that any and all testimony of Chief Wagner in reference to an alleged confession or statements by Arrington be stricken from the record.

The defense feels that these statements as taken, and these alleged admissions as related by these officers, if allowed in, would be a deprivation of due process under the Fourteenth Amendment. I feel there can be no quarrel that the defendant was under indictment (R. 703). (In support of this thesis trial counsel cited *People v. Waterman*, 9 N. Y. 2d 561 and *People v. Di Biasi*, 7 N. Y. 2d 544.)

II.

Further the Court after determining that the objections to the above referred to testimony "puts the Court on Notice that the Court should conduct an examination into the voluntariness of this out of the presence of the jury * * *" (R. 758), the Court after hearing one witness, the Cuyahoga County Prosecutor (who likewise testified that Petitioner confessed during these conferences had after indictment), ruled that "the burden of proving that a confession is involuntary is upon the defendant" (R. 779), that in his judgment the "prosecutor advised him [Petitioner] of his rights, including his rights to have counsel present, his right to make a statement if he so desired" (R. 780), that the Petitioner in fact "waived" his rights (R. 783), and that the confessions were admissible (R. 784). Further, it was stated that the "Court is not ruling upon the propriety of the act of the County Prosecutor (that is, in questioning a person under indictment without the presence or knowledge of his retained counsel)" (R. 784).

The issues involved in the admission of these con-

fessions were the subject of two distinct opinions by the Supreme Court of Ohio, and it cannot be denied that a resolution of these constitutional issues was essential to the determination by that Court.

QUESTIONS PRESENTED FOR REVIEW.

I.

Whether the introducion of an "alleged" confession obtained from an accused after indictment, who was questioned for numerous hours without the knowledge and presence of his retained counsel, is a violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

II.

Whether the introduction of an "alleged" confession obtained in violation of Canon 9, of *The Canons of Legal Ethics of the American Bar Association,* is violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

III.

Whether or not the police and prosecutor's questioning an indicted defendant, in the absence of his counsel, should turn on the narrow question as to whether or not the inquisitors were able to convince the trial court, in spite of a denial, that (a) the interviews were sought by the defendant and (b) counsel was waived.

CONSTITUTIONAL, STATUTORY AND ETHICAL PROVISIONS INVOLVED.

The pertinent portions of the United States Constitution are set out below:

> *Amendment V*—"No person * * * shall be compelled in any criminal case to be a witness against himself * * *."
>
> *Amendment VI*—"In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel in his defense."
>
> *Amendment XIV*—"* * * Nor shall any state deprive any person of life, liberty or property without due process of law * * *."

Canon 9, *The Canons of Legal Ethics of the American Bar Association,* provides:

> "A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law."

STATEMENT OF CASE.

Petitioner was indicted, tried, convicted, and sentenced to life in the Ohio Penitentiary for malicious entry of a financial institution with intent to commit a felony, for burglary of a bank, for attempting to force entrance into a bank vault, and for unlawful possession of burglar tools.

At his trial, the case against him was purely circumstantial. And the issues generated thereby were so close that a considerable portion of the record of the trial

involves prosecution testimony concerning an alleged confession the petitioner supposedly made to the Cuyahoga County Prosecutor, the Chief of the Cleveland Ohio Police Department and a Police Lieutenant. The Petitioner denied that he made any such confession (R. 946-951; 954-957; 959-960). Further, the Petitioner denied as was testified by the above persons that he sent for them, and further denied that he waived his right to counsel.

Significant here, as is apparent by the selected segments of the trial record (quoted below), each of the various interrogators knew Petitioner was represented by Counsel.

From the cross examination of Lieutenant White:

"Q. You knew I represented Mr. Arrington, didn't you, Lieutenant, at this meeting with the County Prosecutor?

A. Yes, sir.

Q. Think it was a little unusual that I wasn't there? Yes or no, please.

A. No.

Q. Did you discuss with Mr. Corrigan whether or not Jerry Milano should have been down there?

A. No.

Q. Where is my office, Lieutenant?

A. In the Payne Building, here on 21st Street, the Film Building." (R. 618.)

From the testimony of Richard Wagner, Chief of the Cleveland Police Department:

"Q. All right, did you feel that Mr. Arrington was represented by myself?

A. Did I feel he was represented by you?

Q. Yes, I knew he was represented by you (R. 764).

* * *

Q. And you have at no time, sir, advised me as to his appointments with you, either before they were made or after they were made, have you, sir?

A. I don't believe that I have. (R. 765.)

* * *

Q. And didn't you have a duty to afford him that you call his attorney down? Didn't you feel that you had that duty?

A. No, sir." (R. 822.)

In determining that this confession was admissible the Trial Judge stated:

"The second part of your motion to strike the confession is that it is inadmissible because it is involuntary, and the involuntariness of the confession is brought about by the fact that it has been induced by a promise by the County Prosecutor in this case.

Taking them in reverse order for the purpose of logically one following the other in the opinion we must make this assumption of law:

First of all, that the burden of proving that a confession is involuntary is upon the defendant, and the voluntariness of each confession in each case must be viewed and determined by the Court by all of the surrounding circumstances under which the confession was given. And the Court is going to take the position that this confession was voluntary, taking into account all of circumstances surrounding the giving of this confession. The defendant was the one that initiated the request for the interview. The Prosecutor advised him as to his rights, including his rights to have counsel present, his right not to make a statement if he so desired. And counsel made some reference to the fact that whose word are you going to take?

We have at this point, at least, the word of the Prosecutor, that this advice was given to him. The Court is not prepared at this point to say whether

the words that the Prosecutor said to the defendant was a promise. If giving it its—giving the defendant every benefit of the meaning of the words, if it was a promise, that promise certainly did not induce the confession, and any confession that was given, as far as this Court can see, was not given as a result of that promise, if we do, just for the sake of this argument and for the sake of the motion, assume that it was a promise. The Court is not prepared to go that far. (R. 779-780.)

* * *

There has been no evidence produced on the part of the defendant that he was not—that this waiver was not given intelligently, understandingly and in a competent manner, or that it was not voluntary, it was without outside pressure or coercion. From what the Court has heard so far, it appears that the defendant is certainly intelligent, he is understanding, and he understands what his rights are, and he is, at least, the little that the Court has been able to surmise from the evidence so far that he is no stranger to a courtroom. As to whether it was voluntary and he acted without coercion, I think that is disposed of by the fact that he initiated that meeting, that he was told of his rights and that, from the testimony of the Prosecutor, that he did not wish to have his counsel with him. And by this, he waived it.

So that, obviously, the Court, as you can assume from the remarks I have made so far, is going to overrule the motion on the ground of the violation of his Constitutional rights under due process clause and under Article 1, Section 10 and Section 16 of the Ohio Constitution. As I have said, it is to be determined by several of the surrounding circumstances:

This, too, as well as the voluntariness of the confession. This Court does not say that under the same circumstances, if this defendant were called down to be interrogated, that the ruling would be the same. *This Court is not ruling upon the propriety of the act*

of the County Prosecutor, but the Court is ruling strictly upon the law and the admissibility of this confession at this time under the law." (R. 783-784.) (Emphasis supplied.)

ARGUMENT RELIED ON FOR ALLOWANCE OF THE WRIT.

It can not be denied that the right to counsel guaranteed an accused by the Sixth Amendment is violated when a confession is obtained by questioning a person under indictment without the presence of his counsel. *Massiah v. United States,* 377 U. S. 201 (1964); *Spano v. New York,* 360 U. S. 315 (1959). And such statements have been held to be inadmissible without regard to their voluntariness or truthfulness. See, *People v. Donovan,* 13 N. Y. 2d 148 (1963); *People v. Meyer,* 11 N. Y. 2d 162 (1962) and *People v. Di Biasi,* 7 N. Y. 2d 544 (1960). Cf., *People v. Waterman,* 9 N. Y. 2d 561 (1961).

Also, it can not be cogently denied that today the admissibility of a confession in a state criminal prosecution is tested by the same standard applied in federal prosecutions. *Malloy v. Hogan,* 378 U. S. 1 (1964). Nor can it be seriously doubted that had the Petitioner been taken after indictment before a court or grand jury, without the knowledge and advice of his counsel, such procedure would be deemed indefensible.[1] Yet, the procedure resorted to here by the prosecution is not sufficiently distin-

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[1] In *Powell v. United States,* 226 F. 2d 269, at 274 (D. C. Cir. 1955) it was recognized that: "No doubt it would be a boon to prosecutors if they could summon before a Grand Jury a person against whom an indictment is being sought and there interrogate him, isolated from the protection of counsel and presiding judge and insulated from critical observation of the public. But there is a serious question whether our procedure fortified by the Constitution permits that procedure."

guishable to require a different result. In fact, the facts here depict a more aggravated situation, one subject to an even greater abuse for such statements were not reduced to writing.

More specifically, in this cause, Petitioner had been indicted and had retained counsel. These facts were known to the County Prosecutor (R. 760), who, further, blandly asserted that he felt no obligation to inform Petitioner's Counsel of these interviews (R. 820-822) and that his duty in this case was merely to advise such person of his rights —which he says he did. Although Petitioner denied that he sought the interview (R. 945) and denied (R. 955) that he confessed.[2] These issues which were resolved against him by the Trial Court (R. 779-784) and the Supreme Court of Ohio are not, in our judgment, determinative of the issue sought to be resolved.

In essence, it is the contention herein being made that this Court ought in an appropriate opinion declare that *any interrogation of a person under indictment without the knowledge or presence of counsel can not be squared with due process.* Further, it is contended that no accused person ought to be placed in the predicament, that Petitioner was placed in, of being interrogated in secret

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[2] If nothing else, appropriate here is what was said by one Court—that is,

> "Even if not fully worth his salt, we may be sure that * * * [any lawyer] would have insisted that any admission would have to be in the form of a written statement, signed and approved by the accused or a record of some kind made and attested to by a court reporter. There would be some kind of assurance of accuracy of the agent's recital of what * * * [was] reputedly admitted. See *Wong Sun v. United States* * * * Here we have a narrative of oral conclusory statements, the accuracy of which is dependent upon the memory and conscience of the inquisitor." *Lee v. United States,* 322 F. 2d 770, at 777 (5th Cir. 1963). Also see Judge Fahy's dissent in *Jackson v. United States,* 337 F. 2d at 144, *Cert. denied,* 380 U. S. 935 (1965).

by persons who later testified from memory that such person confessed. Necessarily this limits the issue for the jury to the simple question: Who are you going to believe—the County Prosecutor, the Chief of Police and one of his Lieutenants or the ex-convict defendant?

At least this much seems clear, when indictment has been returned the lines are pretty well drawn. So much so that such an interrogation as was had here ought never have happened.

In *Massiah v. United States, supra* at 205, this Court emphatically recognized the New York rule, developed in the wake of *Spano v. New York* (360 U. S. 315), that:

> " 'Any secret interrogation of the defendant, from and after the finding of the indictment without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.' *People v. Waterman,* 9 N. Y. 2d 561, 565 [1961]."

And, in commenting on their rule, the New York Court of Appeals has stated:

> "It is the interrogation in the absence of counsel, after the criminal proceeding has been commenced, whether by Grand Jury indictment or by a charge placed before a magistrate following an arrest, which is forbidden. The procedure followed by the law enforcement officers [in questioning such an accused] not only violated * * * [his] right to counsel * * * but also infringed upon his privilege against self incrimination." (*People v. Rodriguez,* 11 N. Y. 2d 279 [1962].)

Further, in the opinion written for this Court in *Massiah,* it was said (377 U. S. at 205) and in cogent language, that "[t]his view no more than reflects a constitutional principle established as long ago as *Powell v. Alabama,*

287 U. S. 45 * * *." Moreover, and in line with this premise this Court ruled:

> "We hold that the Petitioner was denied the basic prosecutions of that guarantee when there was used against him and his trial evidence of his own incriminating words which federal agents elicited from him after he had been indicted and in the absence of his counsel." *Massiah v. United States,* 377 U. S. 201 at 206.

Contrary to the precedents articulated in *Spano* and *Massiah,* the Ohio Supreme Court in this case assertedly would resolve the Fifth and Sixth Amendment rights involved in interrogations of *indicted* persons on the basis of the credibility of the respective parties to the procurement of such confessions and admissions. Viewed in such posture it is a virtual certainty that as between an unsavory defendant—on the one hand, and elected public officials and ranking police officers—the choice of a jury is almost automatic.

Any Statement Secured From an Accused Without Notifying His Counsel of the Interrogation Is Inadmissible.

I.

At first blush, the above contention appears to be an innovation, and if it is, then of course it ought to be. This is so despite the fact that its adoption might—to advance the arguments of others—further hamstring the police and the prosecution. In any event, the fact remains, when such statements are suppressed we are not taking away from the prosecution anything to which they are rightly entitled.

In this regard it has been held that there was a violation of the right to counsel where an accused was taken

before a Grand Jury without informing his counsel. See, *Short v. United States* (No. 17,689) ____ U. S. App. D. C. ____ (Feb. 6, 1964). Aff'd on another ground in *Jones and Short v. United States,* 342 F. 2d 863 (D. C. Cir., *en banc* 1964).

We contend on the basis of this Court's previous holdings that the theory advanced in *Short, supra,* ought to be crystallized into a rule prohibiting all interrogations of formally accused persons without the presence or knowledge of counsel. Any other rule would, and does, unnecessarily expose an accused person to the danger that the issue of guilt or innocence would turn on the narrow, unnecessary and artificial question as to whose version of an unrecorded conversation is the jury going to believe.

II.

As was said in *People v. Waterman, supra,* "The initiation of a criminal action against the accused by the finding of an indictment operates to impose certain disabilities upon the people" (9 N. Y. 2d 561, at 566). Also see *Spano v. New York, supra* (Stewart, *J.*, concurring), 360 U. S. at 327. If this is so, and we submit that it is, then surely the prosecution is at least required to inform retained counsel that his client will be interviewed. This rule ought obtain, even where it is a fact that the arrestee is the one who seeks the interview.

In this cause, Counsel for Respondent (see Brief of Appellee in the Ohio Supreme Court, at pages 20-21) would distinguish this case from *Massiah* on the same basis that the Ohio Supreme Court sought to distinguish *Massiah* in *State v. McLeod,* 1 Ohio St. 2d 60 (1964). *State v. McLeod,* of course, was subsequently reversed by this Court in *McLeod v. Ohio,* 381 U. S. 356 (1965), on the

basis of *Massiah*. Yet, and despite their clear declaration that *McLeod* was controlling, the Ohio Supreme Court upon reconsideration took the strange position that:

> "The facts in the instant case [i.e., petitioner's case] bear no resemblance to either *McLeod* or *Massiah*." (*State v. Arrington*, 3 Ohio St. 2d at 61.)

In the above regard, it is submitted that the Ohio Supreme Court was wrong in both of its opinions, that this Court's opinion in *Massiah* is indeed controlling. And, like in *McLeod*, this Court ought render the same judgment.

III.

It is of interest, in this cause, to note that in *Massiah* some of the members of this Court—after recognizing that the American Bar Association's *Canons* are not of "Constitutional dimensions"—subscribed to the view that:

> "Lawyers are forbidden to interview the opposing party because of the supposed imbalance of legal skill and acumen between the lawyer and the party litigant * * *." *Massiah v. United States*, 377 U. S. at 210-211 (White, *J.*, dissenting).

We submit that counsel for the State was at least required to have informed Petitioner's Counsel of his intention to question him. If nothing else, Petitioner was entitled to the advice that if he participated in such interviews, as was testified to, his interest would be better protected if the interviews were recorded.

Surely if this were a civil case, the action of the State's Counsel, in contravention of Canon 9, would be a matter of grave concern. It should be less a matter of similar concern where more than property is involved.

"Under the Circumstances Here Presented, the Prosecution's Use at the Trial of Evidence of the Petitioner's Own Incriminating Statements Deprived Him of * * * Right[s] Secured to Him Under the Federal Constitution." [3]

The Petitioner was said to have waived his right to counsel in face of the explanation given him by the Prosecutor, who gave direction to the interrogation. And by "Waiver" it is supposed that the trial court determined that there was an "intentional relinquishment or abandonment of a known right or privilege" (*Johnson v. Zerbst*, 304 U. S. 458, 464).

Aside from the fact that Petitioner denied making the confessions and admissions attributed to him, and aside from the fact that he was not unfamiliar with some aspects of a criminal prosecution, the fact that he had retained counsel absolutely imposed on the prosecution the duty to respect resulting relationship of attorney and client. But that is not all; the formulation of this relationship was such that it not only imposed on the defense counsel the obligation of advising his client as to his rights, it further eliminated all other attorneys—especially opposing counsel—from any necessity to advise him.[4] Surely, it is just as much a breach of the rules of fair play for the Prosecution's counsel in a criminal case to interview the defendant behind his counsel's back, as it would be for an insurance counsel to secretly interview an injury victim.

With these thoughts in mind, it is urged that this case be deemed an appropriate one for the declaration that counsel for the prosecution can not, consistent with the

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[3] *Massiah v. United States*, 377 U. S. at 202.

[4] By failing to inform Arrington's Counsel of the impending interview the prosecutor deprived him of the assistance of counsel at a crucial time and greatly to his prejudice—for counsel might have prevented him from making any statements.

requirements of due process, interview an *indicted* defendant without the knowledge of his retained counsel. And that there can be no effective waiver, based on the unilateral declarations of opposing counsel that he arrogated to himself the duty (that was not rightly his) of explaining to such person his rights.

CONCLUSION.

In this case we contend, and urge upon this Court to announce as a doctrine of fundamental due process the views, that:

1. Any secret interrogation of the defendant, from and after the finding of an indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.

2. Counsel for the prosecution is prohibited by Canon 9 of the A.B.A.'s Canons of Ethics from questioning an accused represented by counsel, and more so where such accused has been indicted. And that the mandate of Canon 9 is consistent with the requirements of due process.

3. Any statements secured from an accused person, under either of the above circumstances, without having notified his counsel would be inadmissible.

WHEREFORE, and for the foregoing reasons, petitioner respectfully prays that a Writ of Certiorari be issued under seal of this Court directed to the Supreme Court of Ohio to the end that their judgment may be reviewed and reversed.

JAMES R. WILLIS,
Attorney for Petitioner.

APPENDIX A.

JUDGMENT ENTRY OF SUPREME COURT OF OHIO UPON REHEARING.

This cause was considered by the Court on the appellant's motion for rehearing which was treated as a motion for reconsideration and allowed. On consideration whereof, it is ordered by the Court that, for the reasons stated in the opinion rendered in this matter, its former judgment is adhered to.

APPENDIX B.

JUDGMENT ENTRY OF COMMON PLEAS COURT.

May 27, 1963:

To Court: This day came the Prosecuting Attorney on behalf of the State and defendant Joseph Arrington was brought into court; his counsel coming; also came the jury duly impaneled and sworn, and the trial proceeded.

And the said jury having heard all the testimony adduced, the arguments of counsel, and the charge of the Court, returned to their room for deliberation. And now come the jury, conducted into Court by the bailiff, and return the following verdict in writing, to-wit: "We, the jury in this case, being duly impaneled and sworn, do find defendant Joseph Arrington guilty of violating R. C. 2907.141B as charged in the first count of the indictment. Further, we find Joseph Arrington guilty of burglary as charged in the second count of the indictment, and we further find defendant Joseph Arrington guilty of attempt to force entry into vault as charged in the third count of the indictment, we also find defendant Joseph Arrington

guilty of possession of burglar tools, as charged in the Fourth count of the indictment."

Thereupon, the Court inquired of the defendant if he had anything to say why judgment should not be pronounced against him and he having nothing but what he hath already said:

It is, therefore, ordered and adjudged by the Court that defendant Joseph Arrington be imprisoned and confined in the Ohio State Penitentiary, Columbus, Ohio, for an indeterminate period, and that he pay the cost of this prosecution, for which execution is awarded.

It is further ordered by the Court that sentence on each count run concurrently. (Jr. 101, p. 375.)

HUGH A. CORRIGAN, *Judge.*

APPENDIX C.

JOURNAL ENTRY OF THE COURT OF APPEALS OF THE EIGHTH JUDICIAL DISTRICT, CUYAHOGA COUNTY.

This cause came on to be heard on the appeal on questions of law from the judgment of the Court of Common Pleas, and was argued by counsel for the parties; and upon consideration of all of the errors assigned, the Court finds no error prejudicial to the appellant and therefore the judgment of the Court of Common Pleas is affirmed. It is ordered that appellee recover of appellant its costs herein expended.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellant excepts.

APPENDIX D.

ORIGINAL ORDER OF THE SUPREME COURT OF OHIO CONFIRMING CONVICTION.

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed.

APPENDIX E.

ORIGINAL OPINION OF THE SUPREME COURT OF OHIO IN SUPPORT OF ENTRY AFFIRMING CONVICTION.

PER CURIAM.

Defendant contends that his constitutional rights have been invaded by permitting the confessions to be introduced in evidence and considered by the jury, and that the prosecutor was in error in not notifying defendant's counsel of the proposed interrogation.

The record discloses that defendant sought the interviews at which the confessions were voluntarily made; that he did not request counsel at the time; and that he was not refused the assistance of counsel.

The judgment of the Court of Appeals is affirmed on authority of *State v. McLeod*, 1 Ohio St. 2d 60, 203 N. E. 2d 349.

Judgment affirmed.

TAFT, C.J., and ZIMMERMAN, MATHIAS, HERBERT, SCHNEIDER and BROWN, JJ., concur.

O'NEILL, *Judge* (concurring in the judgment).

I concur in the judgment but not on authority of *State v. McLeod*, 1 Ohio St. 2d 60, 203 N. E. 2d 349, in which case I dissented.

The facts in this case differ materially from those in *Escobedo v. State of Illinois* (1964), 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977; *Massiah v. United States* (1964), 377 U. S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246, and *State v. McLeod, supra.*

I would distinguish this case from those cited above, and I concur in upholding the conviction.

APPENDIX F.

OPINION OF SUPREME COURT OF OHIO ON MOTION FOR RECONSIDERATION.

PER CURIAM. This case is before this court on appellant's motion for rehearing which was treated as a motion for reconsideration and allowed. As appellant states, the affirmance of his conviction was based on the case of *State v. McLeod,* 1 Ohio St. 2d 60, and subsequently the United States Supreme Court reversed the *McLeod* case. 33 L. W. 3375.

The opinion of the Supreme Court of the United States reversing *McLeod* furnishes no guidelines to this court as to what elements in the *McLeod* case caused its reversal. The reversing opinion merely states that the judgment is reversed and cites *Massiah v. United States,* 377 U. S. 201, 12 L. Ed. 2d 246. Speculating as we must, there appear two possible grounds upon which the reversal could have been based even though the confession involved was voluntary. One, that such confession was made after indictment at a time petitioner was not represented by counsel, or, two, that McLeod was not advised

of his right to remain silent and that anything he said could be used against him.

The facts in the instant case bear no resemblance to either *McLeod or Massiah*. The record here shows that both statements made by appellant were given voluntarily in narrative form at interviews instigated by him and at his own request, that these were not interrogatory proceedings, and that at both interviews he was informed that the statements could be used against him. At these interviews the fact that he was represented by counsel was discussed by the prosecuting attorney with appellant and apparently appellant did not want his counsel present. The record shows that such statements were motivated by the desire of appellant to "get even" with one Dick Stewart who caused his apprehension in Alabama.

The trial court, after a full hearing on the question of the suppression of these statements, found that petitioner was not only fully informed of his rights but also that he was well aware of them and intelligently waived them.

Thus, in the present case we have a situation where an accused although represented by counsel voluntarily and at his own request appeared before the prosecuting attorney without his counsel and only after a discussion of the fact that he was represented by counsel and only after he was told that anything he said could be used against him was he allowed to make a voluntary statement.

Our former judgment is adhered to.

FORMER JUDGMENT ADHERED TO.

TAFT, C.J., ZIMMERMAN, MATTHIAS, HERBERT and SCHNEIDER, JJ., concur.

O'NEILL, *J.*, concurring in judgment. The court, in its original opinion in this case (2 Ohio St. 2d 172), relied entirely upon the authority of *State v. McLeod* (1965), in which I dissented, 1 Ohio St. 2d 60, reversed by the Supreme Court of the United States on May 24, 1965, 33 U. S. Law Week 3375.

In its opinion on motion for reconsideration, the court states that the facts in this case "bear no resemblance to either *McLeod or Massiah.*" This being the case, the court should not originally have relied upon *McLeod, supra.*

It requires no speculation on the part of this court to determine the basis for the reversal by the United States Supreme Court of *State v. McLeod, supra.* The defendant in that case was neither granted the right to confer with counsel, nor was he informed of his right to counsel or his right to remain silent. Hence, any statements made by him under those circumstances could not be used against him without prejudice to his constitutional rights. The court, in *McLeod, supra,* unduly limited the application of both *Massiah v. United States* (1964), 377 U. S. 201, 12 L. Ed. 2d 246 and *Escobedo v. Illinois* (1964), 378 U. S. 478, 12 L. Ed. 2d 977.

It is not the duty of defendant to request counsel. It is the duty of the officials attempting to obtain a confession from him to inform him of his rights, and, if he so desires, to give him the opportunity to consult with counsel and to have counsel present at the time he makes a statement.

In both *Massiah, supra,* and *Escobedo, supra,* the rationale appears to be twofold: (1) counsel was not present, (2) because of that fact, or by other means, those in charge of obtaining evidence imposed upon the accused in order to secure incriminating statements against him.

Thus, in *Massiah, supra,* government agents used trickery to obtain statements at a time when the accused was unaware of the circumstances under which he was speaking. In *Escobedo, supra,* the accused was browbeaten by police officers, and was denied the right to consult with his attorney, even after requesting that he be allowed to do so. In *McLeod, supra,* the accused was not informed of his rights.

In the instant case, defendant had an attorney, and had not been denied the right to consult with him at any time. He voluntarily sought out the prosecuting attorney and the chief of police in order to make statements for the purpose of getting revenge upon another. He was informed by the prosecuting attorney, who knew that he was represented by counsel, that he had a right to remain silent, that his statements might be used against him, and that he could expect no consideration for the information he would give. During one of these discussions he indicated that he was dissatisfied with his attorney and might not continue to retain him.

These facts are sufficient to establish that there was no imposition upon the defendant, and that the use of his statements constituted no violation of his rights under the Sixth Amendment to the Constitution as made applicable to the state through the Fourteenth Amendment.

APPENDIX G.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI.

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 4, 1965.

s/ POTTER STEWART,

Associate Justice of the Supreme Court of the United States.

Dated this 6th day of October, 1965.

Office-Supreme Court, U.S.
FILED
JAN 28 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 791.

JOSEPH ARRINGTON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised both in the Court of Appeals for Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed without writing an opinion. The Ohio Supreme Court affirmed in a per curiam opinion, 2 Ohio St. 2d 172, and upon reconsideration adhered to the former judgment of affirmance, 3 Ohio St. 2d 61.

The Ohio courts decided this case in accordance with the statutes of the State of Ohio and in accordance with the Constitution of the United States and the applicable decisions of this Court. There is therefore no substantial federal question involved.

STATEMENT OF THE CASE.

The Cleveland Trust Company branch bank at 5703 Broadway, in Cleveland, Ohio, was entered between closing hours on Friday, September 1, 1962 and early Sunday morning, September 3. This was the Labor Day weekend. Entry was gained by forcing the left rear door. A hole had been made in the wall between the washroom and the bank vault. On the second floor of the bank building a window was open and a window in a skylight had been forced open.

The branch bank at 5703 Broadway occupied the ground floor of the two-story building at the corner of Broadway and Portage Ave. The second floor of the building was vacant. Adjoining the bank on the south was a lower two-story building occupied by the Volunteers of America, and next to that and separated by a narrow passageway was a building occupied by a Singer Sewing Machine store. At the sidewalk end of the passageway there was a wrought iron gate.

A beat patrolman of the Cleveland Police Department noticed in the early morning hours of September 2, 1962 that the gate, which had been open when he saw it earlier, was closed. He flashed a light down the passage and saw the silhouette of a man there. He called to the man to halt. The man ran out to the rear, pursued by the officer, who lost sight of the man outside the rear of the passageway. The officer decided to check the buildings and went through the passageway again. There he saw the door leading upstairs was ajar and bore fresh marks. As he was examining the door he heard noises coming from upstairs and went back to Broadway to summon help. He procured the assistance of an accident car which was then on Broadway. More assistance was summoned and other police cars came to the scene. Two patrolmen went up the stairs and

out onto the roof where they saw two men jumping from the roof of the Volunteers over onto an adjoining roof. The fire department was summoned, a ladder placed in front of an adjoining store. When several officers ascended the ladder they found two men on the roof of the store adjoining the Volunteers of America building. They later learned these men were the defendants Arrington and Oponowicz.

A check of Oponowicz' pockets revealed a handful of live .38 ammunition. Lt. Abel, one of the officers on the roof, questioned Arrington. He related his conversation in the following at R. 136, 139:

> "Q. Will you tell us what you said to Joseph Arrington and what he said to you?
>
> A. I said, 'What are you doing up here?'
>
> He said, 'Well, I thought we would get a little money.'
>
> I said, 'You are not going to need any money where you are going.'
>
> He said, 'No, and I guess I won't be driving my new car, either.'
>
> (R. 139) He said, 'I guess I won't be able to drive my new Lincoln.' "

Detectives Breary and Kochanski, upon arriving at the scene, saw other officers with the defendant Polizzi at the rear of the buildings. These detectives went up the stairs, where Detective Breary recognized one of two men being held by police officers as Alfred Oponowicz. Detective Breary talked with Arrington, at first alone and later in the presence of Detective Kochanski. He related what Arrington told him in their first conversation in the following (R. 182-183):

> "I asked him what he was doing on top of this roof, and he said, 'Well,' he said, 'I needed some money, and I went to 105th and Euclid at the Gray

Drugstore and I met Op'—indicating Oponowicz—and he said the other fellow down there, 'and I told them that I need some money, so they took me along. We went some place in Wilbur and we picked up the tools, then we drove to the vicinity of the bank.'

Then he stated that one of the fellows, he didn't state who, gave him a lift and passed the tools on up to him.

When I talked to him, I asked him what did he expect out of this. He said, 'I probably would get half the score.' On hearing this, I called Detective Kochanski and Patrolman Timko over, and he repeated it, but he, on the second time, stated he would get part of the score.

* * *

I noticed he was limping. I asked him how he got the limp. He said he got it jumping from one roof to the other trying to get away from the police, but he said, 'I could have got away any time, I saw the copper go by four or five times.' "

Detective Breary then called Kochanski and another officer over and said to Arrington, "Now, tell them the story that you told me." Detective Kochanski repeated Arrington's answer in the following at R. 274:

"He said that, well, with reference to being on the roof, he was asked of him being with Oponowicz, he said that he met those fellows at the Gray Drugstore at 105th and Euclid, and there was conversation about needing some money, and that then they went over on Wilbur Avenue and they got the tools and brought them and hoist them on the roof. And my partner asked him, 'What was your part. What were you going to get out of it?'

He said, 'Well, I was going to get part of the score.' "

In a well on the Cleveland Trust roof alongside the skylight the officers found a brown leather-type gym bag,

which contained a monitor radio, a pair of tongs with altered jaws, two wood bits, a pair of needle-nose pliers, a pair of goggles, a keyhole saw. The radio worked on the frequency of the Cleveland police call band. A quantity of equipment of the type commonly used in committing burglaries was found on the roof, including a rotary drill equipped to drill through a masonry or concrete wall, steel drills for cutting masonry, cold chisels, a tarpaulin used to hide the bright light when acetylene equipment is used, a wrecking bar, sledge hammers, three oxygen tanks and two acetylene tanks, cutting torch with hoses and gauges, used to cut through metal walls of a safe, pipe wrench, metal pry bar, and other items.

Patrolman William Misch, on Emergency Patrol, was assigned to take Arrington from the city jail to Metropolitan General Hospital on September 4, 1962. Patrolman Misch and his partner, Patrolman Bill Richards, knew Arrington and in talking with him asked him about a Buick that they had seen him driving. Arrington said the Buick wasn't his, it belonged to his girl friend. (R. 350-353.) While waiting in the emergency room at the hospital the officers struck up a conversation with Arrington to pass the time. Officer Misch's account of that conversation appears at R. 353-56. The highlights appear to be as follows:

The officers asked Arrington what he thought he was going to get out of the safe in the bank. Arrington said, roughly, about $800,000. They asked how he managed to get into the building, and he said that neither the National City nor the Cleveland Trust banks has an ADT alarm, all they have is hold-up alarms.

Arrington was then asked what tripped him up then. He answered that they were not getting any calls coming on the walkie-talkie, that he stuck his head out to see what

was happening, that the beat man spotted him and that he had previously stayed on top of the building for about an hour watching the beat man patrolling the beat. He said he bought the radios at Olson's Radio for $300, that the batteries gave out.

The officers asked Arrington how, with all this concrete and steel, he planned on getting into the place. He said, "We had that all set up. I went out and bought me a bit that cost me $1800 and it could bore through all this concrete and steel; you have your drill in a wall, pull it out, remove the core out of the bit, then drill it back in the wall again," a repeated process. Asked how he got the rest of the tools, he answered that for a job like that "you get nothing but the best. This kit of tools cost me $3,000." He commented that if he had left when he first saw the beat man all he would have lost was $3,000 worth of equipment.

Arrington said he injured his leg jumping off a roof twice as high as the emergency room wall.

Asked what they were going to do with the $800,000, Arrington answered: "What can you do with that kind of money? You can't hide it, you can't put it in a bank, you can't put it in safety deposit box; some man like me come along and steal it again. So I just live it up and have a good time, do a little gambling so that I like to live it up while the money lasts. When the money is all gone I go out, pull another job and get some more money."

He told the officers that on a trip to New York he had traded his Lincoln in on a new fully equipped, air conditioned car and he paid over $1800 on that, and added, "From the looks of things I'm not even going to get a chance to ride in that now."

Arrington also told the officers that the best time to pull such a job was on the first shift, that they stay away from the other two shifts; that when they want to pull a

job of this nature they could get an ADT man so as to have a man inside who "could jump over any wires when they want to go inside the bank," that they could get in contact with three ADT men who would do this.

While awaiting trial in the case at bar, Arrington jumped bail, fled to Birmingham, Alabama, and after his whereabouts had been discovered he was returned to Cleveland in the custody of Cleveland police officers and held at the county jail. He sent a message from the jail to **Lt. Thomas White,** then chief of the burglary squad, that he wanted to speak to White privately. On March 12, 1963, White saw Arrington in the county jail. Arrington told White he was interested in the circumstances which caused his arrest at Birmingham, Alabama. He said a man named Gaye in the jail told him that he, Gaye, had been stopped by some men in a big blue Oldsmobile. Arrington said he knew a man by the name of Richard Stewart who had such an Oldsmobile sedan. Arrington was of the opinion that Richard Stewart and one Allan Walsch were two of the men who along with Dominick Lonardo had talked with Gaye and through him learned where Arrington had fled, and that they caused his arrest in Birmingham. Arrington told Lt. White that Stewart and Walsch had no business doing anything to cause his arrest, "Because I know plenty about them," "You have been trying to get Dick Stewart for a long time," he said, "I can help you get him." (R. 577-579.)

Lt. White told Arrington he was interested in hearing his story. Arrington said, first of all, he wanted to find out if Dick Stewart and Allan Walsch actually did help Dominick Lonardo in locating Arrington in Alabama. White told him he would make a few inquiries and see if he could find out if they had anything to do with it. (R. 580.)

Lt. White reminded Arrington that when the police had asked him in September if any other persons were involved in this crime, he just laughed and didn't want to discuss it. Lt. White further reminded Arrington that if he should tell the truth about any accomplices the police would expect him to furnish some evidence to substantiate his accusations; that if he lied about any of these people he might expect some consequences from them; that Arrington answered, "That doesn't bother me, I can take care of him and if I get a chance, I will kill him." (R. 580.)

Lt. White said he would see what he could do. He returned to the jail to talk to Arrington on March 25th, at which time he told Arrington that Stewart and Walsch were with Dominick Lonardo when they talked about Arrington's whereabouts. Arrington asked Lt. White, "If I could help you with them, what can you do for me?" Lt. White said he could not do anything or promise anything. He offered to arrange a meeting with the County Prosecutor to discuss the matter. Arrington then said, "I can give you a lot of things you want to know." (R. 581.)

Lt. White then asked Arrington about the bank burglary at Portage and Broadway the Labor Day weekend of 1962. Arrington said the men with him were Charles Polizzi, Albert Oponowicz and Richard Stewart, and that Stewart had been seen by a police officer and had fled, and in the resulting police action Arrington, Oponowicz and Polizzi were arrested. Asked what he had to show that Stewart was there, Arrington said, "Well, I will tell you when we sit down with Mr. Corrigan." (R. 581.)

Lt. White asked Arrington if he was involved in other similar crimes in 1962 in the Cleveland area, and he said he was not, but when asked about the Cleveland Trust Bank burglary at 105th and St. Clair in July 1962, Arrington answered, "I was on that and with me were Albert

Oponowicz, Charles Polizzi, Richard Stewart and Allan Walsch." (R. 582.) He said that they got in from the basement, he wasn't inside but was outside as a lookout, that he and Walsch had the walkie-talkies that were later found by the police in Polizzi's car at Portage and Broadway in September 1962. He was asked by Lt. White if he was taken along in the Portage and Broadway burglary just to carry the heavy tools, and answered, "No, I am a pretty good box man, everybody knows that." (R. 582.)

The following appears in cross-examination of Lt. White by defense counsel (R. 623, 624, 625):

"Q. What was the first thing that was said (in Mr. Corrigan's office)?

A. Well, I think I explained to Mr. Corrigan that Joe Arrington had sent for me, and he wished to talk with both Mr. Corrigan and I.

Q. Was Mr. Arrington there at that time?

A. Yes. And that he (Arrington) was interested in getting some consideration from the Prosecutor's office.

And in return for some help that he could give his office and the police department.

Mr. Corrigan told him that there was no way that he could reduce the charges then pending against Mr. Arrington.

Q. * * * and Joe Arrington went on to narrate to you and Mr. Corrigan about how he burglarized the bank on 104th Street?

A. He was part of the group * * *.

Q. And he related the burglary of the 104th Street Bank?

A. Yes.

Q. He related the burglary of the 57th Street Bank?

A. Right.

Q. He advised that he did these things?

A. Yes.

Q. Did this strike you as unusual?
A. No.
Q. No?
A. No. He said he wanted to get even with Dick Stewart."

John T. Corrigan, Prosecuting Attorney, testified that Arrington was brought to his office on March 28, 1963 by a deputy sheriff. Lt. White was the only other person present in Mr. Corrigan's office, Arrington having requested that the deputy sheriff be asked to leave the room. Mr. Corrigan said to Arrington that it was his understanding that Arrington desired to talk to Lt. White and himself. Arrington responded in the affirmative. Mr. Corrigan informed Arrington that he was charged with a serious crime, that he was represented by counsel, that he had a right not to speak to them if he so desired, that they would be appreciative of anything he would tell them but he could expect no consideration whatever in turn for whatever information he would give them.

Arrington said the purpose of wanting to talk to Lt. White and Mr. Corrigan was because he felt that a man named Dick Stewart was responsible for his being apprehended in Alabama and he was desirous of giving us Dick Stewart.

Mr. Corrigan testified that Arrington proceeded to tell them that Dick Stewart, Oponowicz, Polizzi and he had perpetrated the bank burglary at 57th and Broadway, and that these four, along with Allan Walsch, had previously perpetrated the bank burglary of the Cleveland Trust at 105th and St. Clair.

In the course of the conversation Arrington asked, "Is this office bugged?" and was told it was not bugged. He also indicated he wanted to talk to Mr. Corrigan alone. Mr. Corrigan said he would not talk to him out of the presence of Lt. White or some other officer. The conversa-

tion was not elicited by interrogation; it was a narrative statement by Arrington, for his stated purpose of delivering Dick Stewart to the authorities. (R. 789.)

Chief of Police Richard Wagner received word around April 1, 1963 that Arrington wanted to see him, that he had some important information for him. Chief Wagner immediately informed Mr. Corrigan of this and arrangements were made to see Arrington together within the week of April 1st. They met in Mr. Corrigan's office. Arrington said to Chief Wagner that he had some information he thought would be of interest to the officer and that, of course, he wanted to help himself. At that point Mr. Corrigan warned Arrington that there would be no deals made with respect to him and the present case, but they would listen to what he had to say and if he were helpful to the State, the proper officials would be notified of his helpfulness at the proper time.

Arrington reiterated that he wanted to talk to them for the purpose of giving them Dick Stewart because Stewart was the man responsible for having him apprehended in Alabama.

The things he told Chief Wagner and Mr. Corrigan in this conversation were substantially the same as he had said when he talked with Mr. Corrigan and Lt. White. (R. 791.)

On cross-examination of Chief Wagner, the following was developed:

> That he was first informed that Joe Arrington wanted to see him by FBI agent O'Hara who told the Chief that Arrington said that he had some important information that Arrington wanted to give the Chief. (R. 637.)
>
> That Arrington said that Dick Stewart had burglarized the bank. (R. 641.)
>
> That Joe Arrington told me (Chief Wagner) that

he (Stewart) was an accomplice in two bank robberies. (R. 644.)

That he (Corrigan) stated that he would listen, that we would listen to anything Mr. Arrington wanted to say, but that there would be no deals * * *. But that whatever assistance he was able to give the State, any help he would give, would be pointed out to the proper authorities at the proper time * * *. It was my understanding he (Corrigan) was referring to the judge who would be sentencing the defendant. (R. 662, 663, 665.)

That this was not a question and answer "thing" (procedure), but a story, a narration by Arrington * * *. However, several questions were asked during this story. (R. 686.)

He (Arrington) volunteered, he narrated the events of that night * * *. Some questions were asked for clarification * * * there is not an interrogation when somebody is telling an officer something. (R. 730, 731.) "It was an audience given to a man at his request."

The following appears at R. 819-820 in the cross-examination of Mr. Corrigan:

"Q. Did you ask him if he had an attorney?

A. Yes, sir.

Q. What did he say to you?

A. He said that Jerry Milano was his attorney for the moment but he did not know whether or not he was going to stay with Jerry Milano or whether Jerry Milano was going to try his case if he went to trial.

* * *

Q. Didn't you deem it wise that you would call me and inform me of these facts?

A. No, I felt that I had no obligation to inform you of that fact."

At R. 829-830 we find the following in the cross-examination of Mr. Corrigan:

"Q. But now you advised him that you may use it (Arrington's conversation) against him in court?

A. I prefaced my remark when I first spoke with him when he came to my office with the statement to the effect that it was my understanding that he wanted to talk with Lieutenant White and myself, in the first instance, and with Chief Wagner in the second instance. I indicated to him that he was there at his request to talk to us. I indicated to him I was aware that he had counsel, that he had certain rights. I informed him that I could not and would not make any deal with him, that any statement that he made now might be used against him. I indicated, further, that I was desirous of obtaining from him whatever information he would give us. I was desirous of getting cooperation from him. I said, 'Now that you understand this, what do you care to talk about?' Then he proceeded to relate the story that I testified to earlier this morning.

Q. On both occasions you did this?

A. Yes, sir."

ARGUMENT AND LAW.

The questions presented for review and the statement of the case in the petition contain certain unwarranted inferences which we feel should not be permitted to remain unanswered.

Although the petition herein designates the statements in question as "interrogation" of petitioner after indictment, actually no interrogation took place other than a few questions for clarification. The record totally disproves the petitioner's designation of the police and prosecutor as "inquisitors."

In claiming that the case against petitioner was "purely circumstantial" the petition ignores, among other things, the wholly voluntary admissions made to the officers while they were waiting in the hospital emergency

room, as well as the statements made by Arrington when the officers found him on the roof and asked him what he was doing up there.

Contrary to petitioner's claim, the issues at the trial were nowhere close. It is very doubtful that anything that Arrington said in the interviews here under consideration contributed to his conviction.

This case does turn on the question (which the petitioner terms "narrow") of whether the defendant sought the interviews and waived counsel thereat.

The petitioner seeks an absolute rule that "any interrogation of a person under indictment without the knowledge or presence of counsel cannot be squared with due process." Such a rule would constitute a denial of the right of waiver, contrary to the opinions of this Court recognizing such right. In a footnote to Headnote 5 in *Escobedo v. Illinois,* 378 U. S. 478, 12 L. ed. 2d 977, it is stated:

> "The accused may, of cause, intelligently and knowingly waive his privilege against self-incrimination and his right to counsel either at a pretrial stage or at the trial. See Johnson v. Zerbst, 304 U. S. 458, 82 L. ed. 1461, 58 S. Ct. 1019, 146 A. L. R. 357. But no knowing and intelligent waiver of any constitutional right can be said to have occurred under the circumstances of this case."

The question was whether the accused had waived their rights to counsel in a trial in a Federal Court, under consideration in *Johnson v. Zerbst,* 304 U. S. 456, 82 L. ed. 1461. In the opinion by Mr. Justice Black, it is stated (304 U. S. 464):

> "It has been pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not pre-

sume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

* * *

The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without Counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

The Ohio Supreme Court relied on the test laid down in *Johnson v. Zerbst* in its decision in the case of *In re Burson,* 152 Ohio St. 375, wherein it is stated:

"Whether a waiver was made must be determined by the particular facts and circumstances of the case, including a consideration of the background, experience and conduct of the accused. Johnson v. Zerbst, supra (304 U. S. 458, 82 L. ed. 1461, 58 S. Ct. 1019); Buckner v. Hudspeth, Warden, 105 F. (2d) 396; McCoy v. Hudspeth, Warden, 106 F. (2d) 810

* * *

"Whether the petitioner's plea of guilty and consequent waiver of the appointment of counsel was intentional and intelligently made must rest in the sound discretion of the trial judge before whom the plea was taken. * * *"

That there is a clear distinction between the facts in this case and those in *Massiah v. United States*, 377 U. S. 201 is pointed out three times in opinions of the Supreme Court of Ohio in the instant case.

The opinion of O'Neill, J., concurring in the original judgment, states that the "facts in this case differ materially from those in *Escobedo v. State of Illinois; Massiah v. United States*, and *State v. McLeod*." The per curiam opinion of the Court on the motion for reconsideration states:

> "The facts in the instant case bear no resemblance to either *McLeod* or *Massiah*. The record here shows that both statements made by appellant were given voluntarily in narrative form at interviews instigated by him and at his own request, that these were not interrogatory proceedings, and that at both interviews he was informed that the statements could be used against him. At these interviews the fact that he was represented by counsel was discussed by the prosecuting attorney with appellant and apparently appellant did not want his counsel present. The record shows that such statements were motivated by the desire of appellant to 'get even' with one Dick Stewart who caused his apprehension in Alabama.
>
> The trial court, after a full hearing on the question of the suppression of these statements, found that petitioner was not only fully informed of his rights but also that he was well aware of them and intelligently waived them."

And in an opinion concurring in the judgment on reconsideration, Judge O'Neill very well interprets the rationale in *Massiah* and *Escobedo* and the distinction in the instant case, as follows:

> "(1) counsel was not present, (2) because of that fact, or by other means, those in charge of obtaining

evidence imposed upon the accused in order to secure incriminating statements against him.

"Thus, in *Massiah, supra,* government agents used trickery to obtain statements at a time when the accused was unaware of the circumstances under which he was speaking. In *Escobedo, supra,* the accused was browbeaten by police officers, and was denied the right to consult with his attorney, even after requesting that he be allowed to do so. In *McLeod, supra,* the accused was not informed of his rights.

"In the instant case, defendant had an attorney, and had not been denied the right to consult with him at any time. He voluntarily sought out the prosecuting attorney and the chief of police in order to make statements for the purpose of getting revenge upon another. He was informed by the prosecuting attorney, who knew that he was represented by counsel, that he had a right to remain silent, that his statements might be used against him, and that he could expect no consideration for the information he would give. During one of these discussions he indicated that he was dissatisfied with his attorney and might not continue to retain him."

The opinion of the trial court herein is found in Appendix A attached to this brief. The trial court had the duty of testing the credibility of the witnesses. The court concluded that the petitioner had waived any constitutional right to have his counsel with him. It is significant that in overruling the motion the trial court observed that "the defendant is certainly intelligent, he is understanding, and he understands what his rights are, and he is, at least * * * no stranger to a courtroom." (R. 783-84). The trial court held that there was a waiver by Arrington of the right to counsel, stating:

"As to whether it was voluntary and he acted without coercion, I think that is disposed of by the fact that

he initiated that meeting, that he was told of his rights, and that, from the testimony of the Prosecutor, that he did not wish to have his counsel with him. And by this, he waived it."

In recent decisions of the California and Wisconsin Supreme Courts the principle that the right to counsel in connection with a confession may be waived by the accused is recognized. In *State ex rel. Goodchild v. Burke* (March 1965), 27 Wisc. (2d) 244, the Court analyzed the decision in *People v. Dorado*, 42 Cal. 169, 387 Pac. 361, noting that in *Dorado* the California court held that the confession had constitutional defects because, among other things: "(4) the authorities had not effectively informed defendant of his right to counsel or of his absolute right to remain silent, and no evidence establishes that he had waived these rights." The opinion of the Wisconsin court continues:

> "However, Dorado is distinguishable. The California court recognized that Escobedo permits an accused to waive counsel, but emphasizes the point that a right which is not known cannot be waived. The crucial fact difference is that Dorado was not advised of any rights in regard to counsel while (defendant) was and expressly waived his right to be represented. Thus point (4) of the holding is not pertinent to the present case."

This Court has denied certiorari in the *Dorado* case.

The decision in another recent California case, *People v. Stewart*, 43 Cal. Rptr. 201, 400 P. 2d 97 (March 1965) discusses the requirements to establish a waiver, as follows:

> "In *Carnely v. Cochran* (1962), 369 U. S. 506, the United States Supreme Court said, 'The record must show, or there must be an allegation and evi-

dence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.' (Id. at p. 516.) It follows that in order to establish a waiver of the right to the assistance of counsel the record must indicate that the defendant was advised of his right to counsel and to remain silent or that he knew of these rights and intelligently and knowingly waived them."

In a situation somewhat similar to the instant case, in *People v. Pizzaro,* 248 N. Y. S. (2) 1007 (1964), the Appellate Division of the Supreme Court of New York said, at page 1008 of the opinion:

"In our opinion, the voluntary and unsolicited admissions of guilt, three and one-half months after indictment, made by defendant to a detective when defendant on his own initiative asked to see the detective and inquired whether it was possible to work out a 'deal' did not constitute the interrogation by law enforcement officers which 'triggers the right to assistance of counsel,' or right to be informed of defendant's privilege against self-incrimination, and hence testimony of such conversation was properly admitted."

The circumstances of Arrington's two interviews in the office of the prosecuting attorney are not similar to those in any of the cases cited in his petition. The general principle of law involved in those cases; to-wit, the right of an accused to have the aid of counsel for his defense, is not in issue here. Neither is there in the cases cited any question of the right of the accused to waive his right to counsel at any stage of the proceedings. In general, the cases cited by petitioner involve situations where either the accused was not informed of his right to counsel or his request to see an attorney was denied prior to or in

the course of his interrogation by the authorities and such denial, in conjunction with other factors, was held to amount to a denial of constitutional rights of the accused so as to render the confession inadmissible.

In the case at bar there is no indication whatever of "refusal by state authorities of the request to contact counsel" which the Court had under consideration in *Spano,* and other cases cited in defendant's brief.

The decision in *Spano v. New York,* 360 U. S. 315, 3 L. ed. 2d 1270, did not turn on the contention of the petitioner therein that following indictment no confession obtained in the absence of counsel could be used without violating the Fourteenth Amendment, concerning which the majority opinion states (3 L. ed. 2d p. 1270):

> "We find it unnecessary to reach that contention, for we find use of the confession obtained here inconsistent with the Fourteenth Amendment under traditional principles."

The majority of the Court based the reversal on the ground that the confession, obtained by pressure, fatigue and falsely aroused sympathy, had been involuntary, especially since defendant had been refused access to the attorney who surrendered him and who had instructed Spano not to answer.

The opinion in *People v. DiBiasi,* 7 N. Y. 2d 544, 166 N. E. 2d 825, noted that the Supreme Court majority, in *Spano v. New York,* did not directly decide the question of whether following indictment no confession obtained in the absence of counsel can be used without violating the Fourteenth Amendment. The majority opinion in *DiBiasi* characterized the confession in *Spano* as having been gotten from the defendant by police officers by means of long and unfair questioning after defendant had been indicted

and had surrendered himself. The opinion concluded that the questioning of *DiBiasi* was "testimonial compulsion." In neither *Spano* nor *DiBiasi* was there any suggestion of a waiver of right to counsel.

Contrary to the statement in the petition herein, the New York Appellate Court in *People v. Waterman*, 9 N. Y. 2d 561, 175 N. E. 2d 445 was not presented with the same issues that are raised in the case at bar. The *Waterman* opinion speaks of "secret interrogation of the defendant" and "where, as here, he was not first advised of his privilege and his right to the assistance of counsel." Waterman had been questioned by a police officer on two separate occasions between return of the indictment and his arraignment thereon, the first time in the Tombs in Manhattan where Waterman was then incarcerated on another charge, the second in the detention cells of the Bronx County Building. Whatever secrecy was involved in the interviews with Arrington was at his own instigation.

Petitioner cites *People v. Meyer*, 11 N. Y. 2d 162, 182 N. E. 2d 103, where a voluntary unsolicited statement of the accused to a police officer after arraignment following his arrest but before indictment was held inadmissible by a closely divided (6 to 3) court. The view of Froessel, Judge (dissenting), is as follows:

> "The majority would now extend the rule laid down in People v. DiBiasi, 7 NY 2d 544, 200 NYS 2d 21, 166 NE 2d 825, to the voluntary, unsolicited statements made by defendant immediately after he had been arraigned, advised as to the charge against him, and as to his right to the aid of counsel, * * * which he did not request, and weeks before an indictment had been found against him. Neither the Supreme Court of the United States nor this court has ever gone so far, and I see no warrant for our doing so in this case."

Petitioner also cites *People v. Rodriguez*, 11 N. Y. 2d 279, 183 N. E. 2d 651, where Rodriguez and one Carde were convicted of common-law premeditated murder. Here the court followed the rule it laid down in *People v. Meyer, supra*, that questioning of one of the defendants, in absence of counsel, by police prior to indictment but after an arraignment, violated defendant's right to assistance of counsel. This case is to be distinguished from the case at bar. Rodriguez contended that certain statements of his were improperly received in evidence, that he had been induced to confess after being confronted with a gun and other articles illegally obtained from his room. The Court, speaking through Judge Fuld, said:

> "If as he asserts, any of his statements were the product or fruit of an illegal search and seizure, they should have been excluded."

In the case of Arrington, who was no stranger to the courts, it must be emphasized that he asked for the conferences because he wanted to get even with Richard Stewart, that he already had counsel, and that had he wanted his counsel to know of his desire to give information about Stewart to the authorities, he could have so notified his counsel.

CONCLUSION.

In the instant case, all of the requirements of a valid waiver of the right to have counsel present are fulfilled. Arrington, who was no stranger to the courts, sought the conferences with the prosecuting attorney and the chief of police in order to make statements for the purpose of getting revenge upon another. Not only was he informed of his rights, but his sophistication and knowledge of the courts were such that he knew of his rights when he re-

quested the interviews. There is not the slightest indication that Arrington either asked for or was refused the assistance of counsel. On the contrary, it is apparent that he did not want to have his counsel with him and that he intentionally waived the right to have his attorney present.

The totality of the circumstances uphold the decisions of the trial court and the appellate courts of Ohio that the petitioner herein was not only fully informed of his rights but also that he was well aware of them and intelligently waived them, and that the use of his statements constituted no violation of his rights under the Sixth Amendment to the Constitution as made applicable to the state through the Fourteenth Amendment.

The petitioner has not shown any deprivation of the constitutional right to counsel entitling him to review by this Court. The writ should therefore be denied.

Respectfully submitted,

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Prosecuting Attorney of Cuyahoga County, Ohio,

DENNIS J. MCGUIRE,
Assistant Prosecuting Attorney,

CHARLES W. FLEMING,
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APPENDIX "A."

Ruling of the Trial Court re Admissions of Defendant to Prosecutor, After Indictment and Arraignment, in Absence of Defense Counsel. (R. 778-784.)

The Court: All right. The objection to the introduction of the confession is based on, as I understand your argument, on two main grounds; No. 1, that it is a denial of due process to the defendant under the Fourteenth Amendment, under the due process clause. And correlating that to the Ohio Constitution, I would assume you are also arguing that the violation of his Constitutional right, in violation of Article I, Section 10, the pertinent part of which reads as follows:

> "In any trial in any court the party accused shall be allowed to appear and defend in person and with counsel, to demand the nature and cause of the accusation against him, and to have a copy thereof, and to meet the witnesses face to face and to have compulsory process to secure attendance of witnesses in his behalf, and obtain an impartial jury in the county in which the offense is alleged to have been committed. And no person shall be compelled in any criminal case to be a witness against himself."

And I assume, also, you are alluding to Article I, Section 16, entitled Redress in Courts.

> "All courts shall be open and every person for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

The second part of your motion to strike the confession is that it is inadmissible because it is involuntary, and the involuntariness of the confession is brought about by the fact that it has been induced by a promise by the County Prosecutor in this case.

Taking them in reverse order for the purpose of logically one following the other in the opinion we must make this assumption of law:

First of all, that the burden of proving that a confession is involuntary is upon the defendant, and the voluntariness of each confession in each case must be viewed and determined by the Court by all of the surrounding circumstances under which the confession was given. And the Court is going to take the position that this confession was voluntary, taking into account all of the circumstances surrounding the giving of this confession. The defendant was the one that initiated the request for the interview. The Prosecutor advised him as to his rights, including his rights to have counsel present, his right not to make a statement if he so desired. And counsel made some reference to the fact that whose words are you going to take?

We have at this point, at least, the word of the Prosecutor, that this advice was given to him. The Court is not prepared at this point to say whether the words that the Prosecutor said to the defendant was a promise. If giving it its—giving the defendant every benefit of the meaning of the words, if it was a promise, that promise certainly did not induce the confession, and any confession that was given, as far as this Court can see, was not given as a result of that promise, if we do, just for the sake of this argument and for the sake of the motion, assume that it was a promise. The Court is not prepared to go that far.

In 22 *Corpus Juris* 2nd, Criminal Law, Paragraph 817, page 145, 1431—

> "Matters which do not affect the voluntary character of the confession do not render it inadmissible as involuntarily made. A confession is not rendered inadmissible by the fact that when it was made persons in

> authority were present or that he was not represented by counsel, or, if represented, his counsel was not present, or because of any other similar fact. A voluntary confession is admissible regardless of where it was made. If the confession was free and voluntary the motive which prompted it is, as a general rule, admitted as affecting said admissibility."

Going on, the *State versus Johnson,* which is the Arizona case previously cited by counsel for the State, *State versus Johnson,* 69 Arizona 203:

> "The law does not in terms respecting whether or not a prosecuting attorney or a police officer shall not secure statements of a defendant after arrest and prior or subsequent to his arraignment; but the introduction of such statements in evidence can be upheld only when they are wholly voluntary."

And I have indicated to you before, all the surrounding circumstances, including the fact that the defendant volunteered to—or initiated the meeting between himself and the County Prosecutor, that he was told that there would be no deal, that he was—what form or manner in which it was given by him—all of these lead the Court to feel that it was voluntary.

And going back to the first point as to whether or not it was a denial of the due process clause of the Fourteenth Amendment, it quotes the section as I have already cited, the Ohio Constitution, the Court feels, and correctly feels that the defendant certainly has a right to the—to counsel, and the pertinent section of the Constitution says that in any trial in any court the party accused shall be allowed to appear and defend in person by eminent counsel.

And the Court is not going to be—limit the trial to the actual proceeding at the time a plea is made, at which time the evidence on the merits wasn't given, but the Court will agree with counsel that trial certainly extends

throughout all of these processes involved from the time of the filing—at the time of the indictment to the conclusion of the trial. But the Court, by the same token, realizes that the defendant, even though he has this right to counsel, may at any time during this process waive his right to that counsel, and, again, all the circumstances of that waiver must be taken into consideration.

I would like to quote 23 *Corpus Juris Secundum*, Section 979, on page 917, entitled "Waiver of Right to Counsel."

> "Except in some jurisdictions in capital cases, the right to appear by and have the assistance of counsel, or to have counsel assigned, is a personal right which the accused may waive provided it is waived intelligently, understandingly, and in a competent manner. The waiver must be voluntary and intentional, without outside pressure or coercion, by one competent to waive his right. There is no absolute requirement that the accused be represented by counsel; and, ordinarily, as stated above, he cannot be compelled to have counsel. As a general rule, accused has the right to be heard in person, and, if necessary, to conduct his own defense if he is mentally capable of acting for himself."

There has been no evidence produced on the part of the defendant that he was not—that this waiver was not given intelligently, understandingly and in a competent manner, or that it was not voluntary, it was without outside pressure or coercion. From what the Court has heard so far, it appears that the defendant is certainly intelligent, he is understanding, and he understands what his rights are, and he is, at least, the little that the Court has been able to surmise from the evidence so far that he is no stranger to a courtroom. As to whether it was voluntary and he acted without coercion, I think that is disposed of

by the fact that he initiated that meeting, that he was told of his rights and that, from the testimony of the Prosecutor, that he did not wish to have his counsel with him. And by this, he waived it.

So that, obviously, the Court, as you can assume from the remarks I have made so far, is going to overrule the motion on the ground of the violation of his Constitutional rights under due process clause and under Article I, Section 10 and Section 16 of the Ohio Constitution. As I have said, it is to be determined by several of the surrounding circumstances: This, too, as well as the voluntariness of the confession. This Court does not say that under the same circumstances, if this defendant were called down to be interrogated, that the ruling would be the same. This Court is not ruling upon the propriety of the act of the County Prosecutor, but the Court is ruling strictly upon the law and the admissibility of this confession at this time under the law.

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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 791.

JOSEPH ARRINGTON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

REPLY BRIEF OF PETITIONER
To Respondent's Brief in Opposition to Petition For Writ of Certiorari.

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I.

For reasons that shall remain unexplained the Respondent preferred not to address any argument to the serious impropriety involved when an attorney, the Canons of Ethics to the contrary notwithstanding, communicates upon the subject of controversy with a party represented by counsel. In our judgment some response was required, and the fact that these contentions have gone unchallenged adds to their cogency. Surely this must be so: For it would be an unwarranted impeachment of the legal learning of Respondent's counsel to intimate, even if they did not know then, that they have not come to realize that a prosecutor's action in questioning an indicted accused without the knowledge or presence of his counsel cannot be squared with the Canons. Stated another way, their having done so to the prejudice of this Petitioner cannot be validated on the basis of any meaningful precedents.

On the other hand, it is quite possible that the intentional design of Respondent's Brief was to divert the Court's consideration to only one aspect of Petitioner's contentions. And, it is quite possible that a point is made in their discursive argument. On the other hand, if such point is that the trial Court theorized there was a "waiver" of counsel and such determination was affirmed by the Ohio Supreme Court; therefore, this Court ought not intervene. Then such argument is beside the point because "[N]o binding weight can be attached to the State determination. The constitutional requirement is greater. The State Court cannot have the last say when it * * * may have misconceived a federal constitutional right." *Brown v. Allen* (Opinion of Mr. Justice Frankfurter), 344 U. S. 443, at 508.

Not only this but the inclusion in their analysis of *Dorado v. California,* 42 Cal. 2d 169, and *People v. Stewart,* 43 Cal. Rptr. 201, as being consistent with their waiver thesis is somewhat difficult to comprehend. The same is true of their attempt to distinguish *People v. Waterman,* 9 N. Y. 2d 561, on the theory that: "Whatever secrecy was involved in the interviews with Arrington was at his own instigation" (Brief in Opposition, page 21).

Even more glaring is Respondent's treatment of *People v. Meyer,* 11 N. Y. 2d 162 (which they apparently would have this Court resolve on the basis of the dissenting opinion) and *People v. Rodriguez,* 11 N. Y. 2d 279 (which they are erroneously convinced was decided exclusively on Fourth Amendment principles). Of course, it cannot be denied the dissenting opinion in *Meyer* is a minority opinion, and *Rodriguez* did contain a mention of the Fourth Amendment. The point of these cases, however, and principle that emerges from them is that in New York any interrogation in the absence of counsel after criminal proceedings have been commenced is forbidden.

II.

In sum, it is the argument of Respondent that: Although the Supreme Court of Ohio originally reasoned to the conclusion that Arrington's cause was controlled by their opinion in *State v. McLeod,* 1 Ohio St. 2d 60 (which conclusion was suddenly abandoned when this Court's opinion in *McLeod v. Ohio,* 381 U. S. 356, sapped their earlier opinion in this case [that is, in *State v. Arrington,* 2 Ohio St. 2d 172] of its vitality), they now agree with that Court's subsequent opinion on the same facts to the effect that "the facts in the instant case bear no resemblance to either *McLeod* or *Massiah.*" See *State v. Arrington,* 3 Ohio St. 2d 61.

Further noting that Respondent had previously argued (in their Brief before the Supreme Court of Ohio, pp. 21-22) that Petitioner's case was controlled by *State v. McLeod,* which they distinguished from *Massiah* on the same basis as the Ohio Supreme Court had distinguished *McLeod* from *Massiah,* it is our contention that if this fact alone is not significant it at least exposes either a willingness on Respondent's part to allow their notions of due process to fluctuate so as to encompass any theory, even general principles, if it will only sustain this conviction.

CONCLUSION.

For the foregoing reasons, as well as for the reasons set forth in the Petition for Writ of Certiorari, Petitioner renews his prayer that his Petition be granted and upon review that his conviction be revised.

Respectfully submitted,

JAMES R. WILLIS,
Attorney for Petitioner.